Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act

Part 73 Definition and Measurement of Signals of Grade B Intensity

CS Docket No. 98-201

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

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SUMMARY

Redefinition of the Grade B contour or related methodologies by the Commission for purposes of the Satellite Home Viewer Act is *not* the appropriate solution to the current *contretemps* over network service to unserved households. Having been called on the carpet in court and rebuffed in Congress, the satellite industry has pressed the Commission to finesse the courts and Congress by redefining a core concept of the law, thereby altering, perhaps, drastically, the operation of the Satellite Home Viewer Act. The Commission ought do nothing to countenance or encourage such blatant forum shopping and ought eschew advertising itself as an avenue for circumventing injunctions or rewriting laws Congress has purposefully left unchanged.

Second, forbearance by the Commission is essential because the issue strictly involves copyright law. At issue here is the scope of a compulsory license. Congress has refrained from delegating its constitutional authority to any agency, even the Copyright Office. It never in its wildest dreams contemplated the FCC's becoming the expert agency in the field of copyright law.

Third, when Congress established the scope of the satellite compulsory license in the copyright law itself, it left no authority to the Commission. The Commission has no business charging in and imposing a supposedly better way when Congress has made the law and directed that the courts enforce it.

Fourth, the Commission should avoid undoing a careful balancing of competing interests achieved by Congress in 1988 and 1994. Congress expressly limited the scope of the satellite compulsory license. It carefully drew a line. The Commission should resist the temptation to redraw it for purposes unrelated to copyright law.

Fifth, in the next Congress, Congress will determine whether section 119 should be changed in light of the current litigation and concerns which prompted the satellite carriers to attempt to hide behind the Commission's skirts. Congress also is expected to consider the true solution to the "unserved household" problem, enactment of a local-into-local compulsory license.

Sixth, the Commission should halt in its tracks any more efforts to solve problems with solutions that weaken local television stations. The Commission, therefore, is far better advised to take a cue from Congress and preserve and protect the integrity of the network-local affiliate relationship.

Seventh, a change in the definition of Grade B signal intensity adopted solely to address its use in the Satellite Home Viewer Act would be inherently arbitrary and capricious. In essence, the

SHVA tail would wag the engineering dog. Does the Commission truly believe it could justify the widespread chaotic consequences of changing the Grade B intensity level in order to permit a million or so scofflaws to continue to receive network signals they never should have received in the first place? The Commission, therefore, should leave the matter where it belongs -- in Congress and the courts.

ALTV, however, strongly urges the Commission to recommend to Congress amending the satellite carrier compulsory license to cover satellite retransmission of local television station signals in their home markets *provided mechanisms are put in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.* ALTV further submits that the Commission ought recommend legislation assuring that satellite retransmission of broadcast station signals causes no infringement of exclusive program exhibition rights of local television stations.

Finally, the Commission should be circumspect in its goals in making any recommendation concerning the "unserved household" issue. First, the true solution to the problem no longer is a pipe dream. Satellite retransmission of the signals of local network affiliates within their home markets is likely to be a reality sooner rather than later. Second, to the extent any areas remain unserved, the development of digital television will eliminate much, if not all of the uncertainty about whether a particular household is unserved by a particular network. Third, the "unserved household" provision was not intended to make-up for the shortcomings of consumers' aging sets or inadequate antennas. If anything, the Commission should be encouraging consumers to maintain adequate off-air reception capability. Fourth, as the emerging networks develop, the importance of preserving local network affiliates' access to their audiences will grow likewise.

Well-motivated, but ill-conceived actions like those proposed herein invite unintended consequences and judicial rebuke. In this case, in particular, they also would trample on the prerogatives of Congress and the courts, both of which are actively involved in sorting out the dispute and resolving the controversy. More to the point, they would do damage to the system of local television broadcasting the Commission has nurtured and promoted for many decades. ALTV, therefore, urges the Commission to do nothing more in this proceeding than make sound recommendations to Congress after a searching and thoughtful review of the issues.

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The following comments are submitted by the Association of Local Television Stations, Inc. ("ALTV"), in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding.[1] ALTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks.[2]

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[1]FCC 98-302 (released November 17, 1998)[hereinafter cited as *Notice*].

[2]Local stations among ALTV's members include not only traditional independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB, and the new PaxTV network. As used herein, the term "local television stations" includes ALTV member stations, but excludes affiliates of ABC, CBS, and NBC.

I. INTRODUCTION

ALTV's member stations will be affected directly by the Commission's action in this proceeding. Indeed, ALTV's Fox affiliate members already have been active in litigation seeking DBS operators' compliance with the Satellite Home Viewer Act provisions which are the subject of this proceeding. Furthermore, the bulk of the remaining members of ALTV are affiliates of the UPN, WB, and PaxTV networks.[3] As these networks enter the realm of established networks, their affiliates increasingly will share the concern of affiliates of the more entrenched networks with respect to satellite retransmission of the signals of distant stations affiliated with the same network. No less than their competitor affiliates in their local markets, they will seek to assure that they remain the preeminent source of their network's programming in their markets. Perhaps, more than their competitor affiliates of the entrenched national networks, they will press for implementation of a local-into-local satellite compulsory license which is conditioned on carriage of all local television stations by satellite carriers which elect to provide local signals in their markets.

For ALTV's member stations, the issue always involves an additional dimension. In this case, ALTV's member stations are concerned not only about preservation of the integrity of the network-local affiliate relationship, but also about preventing competitive imbalances among television stations in local markets. Exacerbating the competitive advantages jealously guarded by affiliates of the three entrenched networks (ABC, CBS, and NBC) only would impede the full flowering of competition and diversity in local broadcast television. In the last decade, the notion of four broadcast networks was met with skepticism. The thought of seven networks was the product of a deranged dream. Today, however, the three entrenched networks are "enjoying" competition from an ever stronger and solidly established Fox network. UPN and WB have taken off. PaxTV, in operation for less than a year, has met its initial audience goals. Thus, these newly

[3]Also included are numerous stations owned by entities which own or hold substantial interests in these new and emergent networks.

established and emergent networks have enhanced competition and improved program choices for all viewers, not just those willing or able to subscribe to cable, DBS, or another MVPD. Nonetheless, each of these networks suffers the handicap of a largely UHF and more restive affiliate base, a less extensive program schedule, and affiliates which daily confront an uphill struggle to compete with longtime local affiliates of the entrenched networks -- to say nothing of burgeoning competition from well over 100 cable networks available to the majority of viewers on cable, DBS, and other MVPDs. Therefore, in an effort to maintain a framework for successful integration of satellite signal delivery into the local video marketplace, ALTV joins the effort to find a sound resolution of the troublesome "unserved household" problem and related issues.

In ALTV's view, Commission redefinition of the Grade B contour or related methodologies for purposes of the Satellite Home Viewer Act is *not* the appropriate solution to the current *contretemps* over network service to unserved households. ALTV, however, strongly urges the Commission to recommend to Congress amending the satellite carrier compulsory license to cover satellite retransmission of local television station signals in their home markets *provided mechanisms are put in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.* Retransmission of the signals of local network affiliates is, when all is said and done, the best means to assure that network signals reach unserved households. ALTV further submits that the Commission ought recommend legislation assuring that satellite retransmission of broadcast station signals causes no infringement of the exclusive program exhibition rights of local television stations. Finally, if the Commission is inclined to offer its views on a legislative resolution of the unserved household dispute, ALTV would urge only that any such recommendation reflect circumspection and due deliberation, as well as the Commission's commitment to localism and the integrity of the network-local affiliate relationship.[4]

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[4]Notice at ¶¶3, 28; ALTV suggests that the Commission conduct a more deliberate and careful examination of the issues via a *Notice of Inquiry*, rather than plunge forward heedlessly in an needlessly expedited proceeding.

II. RESOLUTION OF THE UNSERVED HOUSEHOLD ISSUE OUGHT BE LEFT TO CONGRESS AND THE COURTS.

This is not a proper matter for Commission intervention. ALTV has no doubt the Commission's heart is in the right place. A workable long-term solution to the issue is necessary, and competition for cable should draw widespread applause.[5] The Commission, however, faces far more compelling reasons to stay its hand. First, Commission involvement in the "unserved household" issue would at best be meddlesome. The satellite industry has made a mockery of the law -- as the Commission itself recognizes.[6] Consequently, the courts have shown precious little sympathy for its position.[7] Congress, meanwhile, resisted the satellite industry's pleas for remedial legislation in the last Congress.[8] Thus, having been called on the carpet in court and rebuffed in Congress, the satellite industry has pressed the Commission to finesse the courts and Congress by redefining a core concept of the law, thereby altering, perhaps, drastically, the operation of the Satellite Home Viewer Act. The Commission ought do nothing to countenance or encourage such blatant forum shopping. Litigation is ongoing. Congress had the opportunity to modify the law, but did not do so. The Commission ought eschew advertising itself as an avenue for circumventing injunctions or rewriting laws Congress has purposefully left unchanged. Commission action now would usurp the jurisdiction of the courts and supplant Congress as the maker of copyright law. Furthermore, it would tend to unsettle and even stifle settlement negotiations among the parties to the current litigation.

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[5] *Notice* at ¶15.

[6] *Notice* at ¶15.

[7] *See Notice* at ¶¶7-8.

[8] "Wait 'til next year," *Broadcasting & Cable* (October 19, 1998) at 24.

Second, forbearance by the Commission is essential because the issue strictly involves an area beyond the Commission's jurisdiction and day-to-day expertise -- copyright law. At issue here is the scope of a compulsory license. The Commission certainly may make its views known to Congress on such matters, particularly as they relate to media within the Commission's jurisdiction. Indeed, it has done so in the past.[9] Functionally rewriting a copyright statute, however, would be something else entirely. Congress has refrained from delegating its constitutional authority to any agency -- even the Copyright Office, which does have considerable day-to-day expertise in copyright matters.[10] It has maintained its authority and expertise in the judiciary committees of the respective houses. It has left enforcement to the expertise of the courts. It never in its wildest dreams contemplated the FCC's becoming the expert agency in the field of copyright law.

Third, when Congress established the scope of the satellite compulsory license in the copyright law itself, it left no authority to the Commission.[11] This contrasts markedly with the cable television compulsory license where Congress expressly did leave to the FCC the functional authority to define the scope of the license.[12] Again, too, even the Copyright Office has no authority to:

9*Cable Compulsory Copyright License*, 4 FCC Rcd 6562(1988).

10*See* Report of the Register of Copyrights, *The Cable and Satellite Compulsory Licenses: An Overview and Analysis* (March, 1992) at 130 [[hereinafter cited as "Register's Report"].

11Regardless of any debate or discussion over whether satellite signal carriage issues are more appropriately matters of communications or copyright policy, Congress has decided that the unserved household issue is a matter of copyright law.

1217 U.S.C. §111(c)(1) & (2)(a).

> [E]xpand the compulsory license according to public policy objectives. That matter is for Congress.[13]

If the agency given responsibility to administer the satellite compulsory license has no authority to enlarge its scope, the Commission hardly may make a valid claim to such authority. In short, the Commission has no business charging in and imposing a supposedly better way when Congress has made the law and directed that the courts enforce it.

Fourth, the Commission should avoid undoing a careful balancing of competing interests achieved by Congress in 1988 and 1994. Congress relied on a known standard in using the Grade B signal intensity criterion in Section 119. Use of that criterion represented a careful balancing of competing interests. Congress wished to provide network signals to satellite viewers, but not at the cost of derogating the network-local affiliate relationship and the diversity of local broadcast service it had engendered. If the Commission redefines the Grade B contour, then it will shift the balance in ways not contemplated by Congress in enacting in the Satellite Home Viewer Act. Again, the issue is not whether satellite carriers may retransmit network signals to any particular area or household, *but whether they may use a compulsory copyright license to do so*. Congress expressly limited the scope of the license. It carefully drew a line. The Commission should resist the temptation to redraw it for purposes unrelated to copyright law.[14]

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[13]Register's Report at 130.

[14]The Commission appears intent on redrawing the line to permit more widespread retransmission of the signals of distant network affiliates. Such an expansion in the scope of the compulsory license clashes with Congressional intent. Although the law is couched in terms of "unserved households," ALTV respectfully suggests that Congress was not seeking to get a high quality digitally-transmitted picture to any household with a less than perfect picture from a local network affiliate. It was not seeking to provide cable subscribers who had dismantled their outdoor antennas with a back door way to get network service. It was not seeking an alternative for homeowners who oriented their antennas to one market versus another or split their antenna feeds to serve multiple sets. What Congress was attempting to do was to get service to households in areas where no service was available, the so-called white areas. Congress was attempting to get unavailable signals to predominantly rural areas, not better pictures to satellite subscribers in urban and suburban locations. H.R. Rep. No. 100-887, Part I, 100th Cong., 2d Sess. (1988) 15, 18 [hereinafter cited as "1988 H.R."].

Fifth, Congress will resolve any controversies concerning the law itself in the next Congress. The process was begun, but not completed in the last Congress. Next year, Congress may let the satellite compulsory license expire; it may extend it without material change; it may amend it significantly. One way or the other, however, Congress will consider and determine whether section 119 should be changed in light of the current litigation and concerns which prompted the satellite carriers to attempt to hide behind the Commission's skirts. Congress also is expected to consider the true solution to the "unserved household" problem, enactment of a local-into-local compulsory license. Such legislation was reported out of the judiciary committees in both houses in the last Congress.[15] Therefore, the Commission need not rush in with a band aid, when the main operation shortly will begin in Congress.

Sixth, the Commission should halt in its tracks any more efforts to solve problems with solutions that weaken local television stations. Local television stations already are required to provide their programming to cable operators and satellite carriers via a compulsory license and suffer the erosion of their audiences at the hands of these new competitors. They already are asked to compete with single entities providing multiple channels of programming in direct competition with their one channel. They already are asked to provide public affairs programming, childrens' programming, and cut-rate political advertising, whether such programming is viewed or popular enough to be profitable. They already are required to build DTV facilities at considerable expense, despite the lack of appreciable audience and enormous uncertainty about the public demand for DTV service. Now the Commission would ask them to surrender more of their audiences to distant stations affiliated with the same network. The irony of all this is that broadcast television has survived as the strongest competition to cable, still attracting larger per-channel audiences and

[15]"Wait til next year," *supra.*

damping increases in subscriber fees.[16] The Commission, therefore, is far better advised to take a cue from Congress and preserve and protect the integrity of the network-local affiliate relationship.

Seventh, the Commission's authority to change the definition of a Grade B signal hardly places an automatic *imprimatur* on a change in the definition adopted solely to address its use in the Satellite Home Viewer Act. To the contrary, such a change would be inherently arbitrary and capricious. In essence, the SHVA tail would wag the engineering dog. The Commission has stated without reservation that it has "no evidence that the underlying technical planning factors have changed in a way that would justify revising the current Grade B intensity levels."[17] In such circumstances, how would the Commission explain revising the Grade B intensity levels in its broadcast engineering rules in a proceeding focusing on the Satellite Home Viewer Act? How could it even begin to consider in the rushed course of this proceeding to analyze the effects of such a change on all the other Commission rules which employ the Grade B intensity level or contour? Would the Commission then proceed to reengineer its DTV Table of Allotments or facilities upgrade criteria? Does the Commission truly believe it could justify the widespread chaotic consequences of changing the Grade B intensity level in order to permit a million or so scofflaws to continue to receive network signals they never should have received in the first place? Rhetorical questions? Today, yes. Tomorrow in court....hardly.[18]

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[16]*Report and Order and Second Further Notice of Proposed Rule Making,* MM Dkt. No. 90-4, 6 FCC Rcd 4545 (1991).

[17]*Notice* at ¶27.

[18]If any party sought judicial review of a Commission action in this proceeding, the continuing uncertainty surrounding the operation of Section 119 would place a cloud over Congressional deliberations and court proceedings. One might recall that the Commission (and Congress) were hamstrung by uncertainty over cable television copyright liability and regulation until the Court resolved the issue of cable's copyright liability under the 1909 Copyright Act. *See Cable Television Report and Order*, 36 FCC 2d 141, 167 (1972).

ALTV, therefore, submits that any change in the Grade B field intensity level or related methodologies would be unwise, illegal, and arbitrary *per se*. The Commission, therefore, should leave the matter where it belongs -- in Congress and the courts.

III. THE COMMISSION WOULD BE BETTER ADVISED TO MAKE SOUND RECOMMENDATIONS TO CONGRESS CONCERNING SATELLITE RETRANSMISSION OF BROADCAST TELEVISION SIGNALS.

ALTV, while urging a judicious approach to redefinition of the Grade B signal intensity level, does urge the Commission to offer Congress a sound recommendation for dealing with the issues arising from satellite retransmission of distant signals. The Commission is the recognized repository of expertise in communications policy. Carriage of broadcast signals traditionally has been a matter of communications policy.[19] ALTV, therefore, submits that the Commission should make appropriate recommendations to Congress concerning satellite retransmission of the signals of broadcast television stations, as follows:

A. Satellite Carriers Should be Permitted to Retransmit the Signals of Local Television Stations in Their Home Markets on a Nondiscriminatory Basis.

Retransmission of the signals of local television stations within their local market areas should be permitted and subject to compulsory licensing, *provided* mechanisms are in place to assure that the compulsory license is not used for discriminatory or selective carriage of local

[19]The Commission presumably has made no rules in recognition that Congress in the case of satellite carriers had adopted limitations in the compulsory license in Section 119. The Commission could adopt its own rules governing satellite carriage of broadcast signals, irrespective of the compulsory license. Therefore, if the Commission wished to adopt more or less restrictive rules (*vis-a-vis* the compulsory license) governing satellite carriage of distant network affiliate signals, it could do so. However, the compulsory license would remain applicable only to those signals specified in Section 119 absent a change in the statute by Congress.

signals in local television markets.[20] Such mechanisms already exist with respect to cable television.[21] Identical rules apply to OVS.[22] In the case of satellite retransmission of local television stations within their home markets, no rules exist at the FCC or in the Communications

[20]No rational doubt may exist that a local station denied access to a portion of its in-market audience is injured. Lack of carriage reduces potential audience and, therefore, actual audience. Reduced audiences translate to reduced revenue. Even where revenue reductions are less than fatal, they still affect a station's ability to provide the best practicable service to the public. *See Memorandum Opinion and Order*, 8 FCC Rcd 8270, 8294, n.64 (1993), *affirmed sub nom. Capital Cities/ABC, Inc., v. FCC*, No. 93-3458 *et al.* (7th. Cir.,decided July 12, 1994) [citations omitted]("[W]e believe that by enhancing the financial well-being of independent stations, the "fringe hour" revenue stream inevitably helps to support local programming efforts.... [S]uch efforts further enhance program diversity.") At best, a local station which a satellite carrier refuses to carry would be placed at a demonstrable disadvantage *vis-a-vis* competing broadcast television stations which are carried. *See also Turner Broadcasting System v. Federal Communications Commission, supra*, 1997 U.S. LEXIS 2078, *51-*55.

[21]Cable systems are required to devote up to one-third of their active channel capacity to carriage of local signals. 47 CFR §76.56(a)(1). Inasmuch as most modern cable systems have a channel capacity of 36 to 54 channels, few instances exist where the number of local stations exceeds the designated capacity of the cable system. *See also Turner Broadcasting v. Federal Communications Commission, supra,* 1997 U.S. Lexis 2078, *61 ("94.5 percent of the 11,628 cable systems nationwide have not had to drop any programming in order to fulfill their must-carry obligations").

[22]47 CFR §76.1506(d). SMATV systems never have been subject to the must carry rules on the theory that they employ antennas which do not discriminate among incoming signals. In fact, although antennas receive without discrimination, the signal distribution system sometimes does. However, despite the fact that some local signals may not be carried, the number of viewers reliant on SMATV systems for their exclusive access to local television stations is very small, approximating barely over one million households nationwide. *Third Annual Report*, 12 FCC Rcd 4348, 4403 (1996); *see also Fourth Annual Competition Report, supra,* at ¶84.

Act.[23] The satellite carrier compulsory license, as currently written, does not contemplate retransmission of local broadcast television station signals within their home markets.[24]

ALTV submits that the satellite carrier compulsory license should be amended to permit satellite carriers to retransmit signals of local stations in their home markets, but only if satellite carriers are first subject to "must carry" rules akin to the current cable "must carry" rules.[25] Blatantly discriminatory signal selection by satellite carriers like EchoStar ultimately would undermine the ability of new networks, their affiliates, and innovative independent stations to compete toe-to-toe with the ever expanding array of nonbroadcast program networks and services,

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[23]ALTV recognizes that satellite carriers now serve a relatively small proportion of television households and, for the time being, pose only a marginal threat to any station which they fail to retransmit in its local market. However, the satellite carriers are in business to expand, not stagnate. The Commission's latest annual assessment of competition in the video market notes projections of as many as 15 million DBS subscribers by 2001. *Fourth Annual Competition Report* at ¶55. They hope to attract not only noncable households in remote areas, but also cable subscribers in core market areas. Indeed, they would hope to supplant cable as the home's multichannel video provider. The ability to provide local signals may enhance their marketability. *See FCC Competition Report* at ¶58. One easily may anticipate the day when nearly all television households are served by a multichannel video provider -- and most likely only one such provider, cable or DBS. Together, they will serve the vast majority of television households, and each will have a sufficient market share, such that if either of them failed to carry some local stations, the stations' viability would be threatened. At the very least passed over stations would be placed at a meaningful competitive disadvantage not only against their local broadcast competitors, *an especially troublesome prospect for affiliates of emerging networks*, but also against the competing multichannel video providers!

[24]Under Section 119, superstations may be furnished to satellite subscribers within the superstation's home market. Beginning in 1998, no fee was imposed for such carriage. No provision appears to permit satellite carriers to retransmit the signals of network affiliates to viewers in the affiliates' home markets. *But see* Letter from Marilyn Kretsinger, Acting General Counsel, Copyright Office, to William S. Reyner, Jr., Hogan & Hartson (August 15, 1996).

[25]ALTV does not propose that satellite carriers be forced to carry local signals in every market (as is required of cable systems). However, if a satellite carrier retransmits the signal of one local television station in a market to subscribers in that market, then it should be required to carry all local stations in that market *or* at least provides a satellite subscriber with the same local signals a comparably situated cable subscriber would have available from its cable system. This would maintain parity between competing media by assuring that the satellite carrier were subject to no more rigorous obligations than a directly competitive cable system.

as well as with their entrenched big three network competitors in their local markets. Placed in jeopardy will be the promise of enhanced competition and greater program diversity these new networks and independent stations furnish all viewers, not just those able and willing to subscribe to a multichannel program service like cable television or DBS. Therefore, ALTV urges the Commission to recommend amendment of the satellite carrier compulsory license to cover satellite retransmission of local television station signals in their home markets *only if and when complementary rules are adopted requiring that all local stations be carried in any market where the satellite carrier elects to provide the signals of any local station.*

Furthermore, the effective date of such a "carry one, carry all" provision should be immediate. Any approach involving a deferred effective date would be an engraved invitation to the satellite carriers to pursue self-serving, short-sighted strategies and seek extension after extension of the effective date. The current EchoStar business plan illustrates this potential. EchoStar is retransmitting the signals of four local affiliates and initially has extended this service to the 20 largest markets serving over 40% of the nation's population. Thus, EchoStar has made a decision to use a portion of its capacity to provide a few signals to a substantial proportion of the nation's households. Alternatively, EchoStar might have provided all signals in a few less markets initially. Under a deferred local "carry one, carry all" requirement, EchoStar a year or two down the road "suddenly" would find itself required to carry all signals in markets where it had been providing a few local signals. The practical effect of shifting capacity to markets where local stations had to be added might well be a reduction in the number of markets where local signals are provided. Consequently, viewers in those markets may have local signals withdrawn from their satellite service. Withdrawing services from viewers never is popular. Moreover, it places the provider withdrawing service in a position to stage a chorus of complaints from viewers whose services are subject to curtailment. Political pressure to extend the deferral would be substantial, something well known to the satellite provider when it pursued its initial strategy of discriminatory carriage of

local signals and something which the satellite carrier inevitably would exploit. Congress and the Commission would be placed in an impossible position, and the deferred effective date thereby becomes the victim of numerous extensions.

Finally, a "carry one, carry all" rule hardly is an onerous burden on satellite carriers especially viewed in the light of the benefits which accrue to satellite carriers under the compulsory license. What satellite carriers want is the ability to enhance its service so as to compete more effectively, while avoiding any additional programming cost via a no fee compulsory license. Make no mistake. ALTV hardly disagrees with the notion that competition is good...but promoting competition in one market while subverting it in another is shortsighted and self-defeating. Historically -- and rightly -- the cable and satellite compulsory licenses have carried with them the complementary obligation to use broadcast signals in a manner consistent with preserving the many benefits of free broadcast television service. The Commission should urge Congress to preserve that relationship.

No compulsory license or FCC rule should become a vehicle for inherently anticompetitive discrimination among local stations or other actions which would undermine the integrity of the nationwide system of local broadcasting engendered by the Communications Act.[26] Nothing could more surely dull the cutting edge of competition from new networks, their local affiliates, and

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[26]Notably, Congress determined to adopt a compulsory license for cable only in conjunction with FCC rules which defined the scope and prerequisites of the license. *Cable Television Report and Order, supra*. Thus, the adoption of FCC rules in 1972 preceded the establishment of the compulsory license in the 1976 Copyright Act. *See* Letter from The Honorable John L. McClellan, Chairman, Subcommittee on Patents, Trade-Marks, and Copyrights, United States Senate, to the Honorable Dean Burch, Chairman, Federal Communications Commission (January 31, 1972), *reprinted at* Appendix E, *Cable Television Report and Order, supra,* 36 FCC 2d at 287 ("[I]t is the intention of the subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules."). Had the compulsory license preceded the adoption of the FCC's signal carriage rules, then the rampant unregulated use of broadcast station signals by cable systems would have become impossible to harness. Even in 1972, the FCC grandfathered all existing signal carriage so as to avoid depriving consumers of signals to which they had become accustomed. *Cable Television Report and Order, supra,* 36 FCC 2d at 185.

innovative independent stations in local television markets. Nothing could more seriously threaten the ability of local television stations to offer an expanded range of program diversity to all local viewers *gratis*. Nothing could more directly affront sound notions of competitive parity. More to the point, when all is said and done, consumers will bear the loss in the quality and quantity of free broadcast television service and the diminished incentives to create new television programming. Therefore, the Commission should recommend that Congress extend the compulsory license to local signals *only if and when complementary rules are adopted requiring that all local stations be carried in any market where the satellite carrier elects to provide the signals of any local station.*[27]

B. Local Television Stations' Exclusive Rights to Exhibit Network and Syndicated Programming Should Be Protected from Infringement by Retransmission of Out-of-Market Signals by Satellite Carriers.

The Commission also should recommend provisions preserving local stations' exclusive rights to their network and syndicated programming. Presently, cable television systems are subject to FCC rules which protect the exclusive rights of local stations to exhibit network and syndicated programming in their markets. These rules generally prohibit a cable system from retransmitting a program broadcast by a station carried by the system if a local station has exclusive rights to the program in the geographic area served by the cable system.[28] This rule now ought be

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[27]Fears that such a regime would trample satellite carriers First Amendment rights have no basis. The cable must carry rules survived the cable industry's constitutional assault. *Turner Broadcasting v. Federal Communications Commission, supra.* Whereas one may attempt to rely on distinctions between cable systems and satellite carriers, such distinctions fade in the wake of the decision of the D.C. Circuit upholding rules requiring satellite providers to set aside a small percentage of capacity for educational programming. *Time Warner Entertainment v. Federal Communications Commission*, 93 F. 3d. 957 (D.C. Cir. 1996). In any event, satellite carriers gain relief from the normal operation of the marketplace under a compulsory license. Congress may grant such a privilege contingent on nondiscriminatory carriage without infringing the First Amendment rights of the beneficiary.

[28] Thus, for example, a cable system in Washington, D.C. must delete a broadcast of *Home Improvement* from a distant signal if a Washington, D.C., station has an exclusive right to exhibit the program in Washington. (N.B. Under §73.658(m) of the FCC rules, a station may secure in its program license agreement geographic exclusivity within a 35-mile radius of its community of license.)

applied to satellite carriers as well.[29] No reason exists to provide stations the ability to secure exclusive rights in one portion of the copyright law, but negate that right in another. Indeed, in an ever more competitive marketplace, any video provider's ability to maintain its exclusive rights becomes even more valuable and critical to its ability to offer a distinctive, competitive program schedule.

Although the FCC found application of a "syndex" rule technically unfeasible in 1989, the question of feasibility deserves another look. Technology has advanced on numerous fronts. Satellite carriers already protect local sports blackout requirements. Provision of syndicated and network program exclusivity would add only dimension, but no additional complexity to the process.[30] Thus, the matter of program exclusivity *vis-a-vis* satellite retransmissions is more than ripe for another hard look from Congress and the Commission.[31]

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[29]This need is recognized implicitly in the Satellite Home Viewer Act of 1994, which imposed a higher fee for satellite retransmission of superstation signals which otherwise would be subject to program deletions under the FCC's syndex rules. *See* 17 U.S.C. 119(b)(1)(B)(I). This is a poor substitute for the ability of a station to preserve the exclusive rights it bargained and paid for in acquiring local exhibition rights to a syndicated program.

[30]Compliance burdens also would be reduced by the fact that some superstations are, indeed, "syndex-proof" (*i.e.*, their national satellite feed contain no programming which would infringe the exclusive rights of local stations).

[31]The need for similar network exclusivity or nonduplication protection is equally compelling, regardless the ultimate scope of the satellite compulsory license. Under the current satellite compulsory license, major network affiliates may be retransmitted only to subscribers without terrestrial access to the network's programming via a local affiliate of the network. Thus, infringement of such local affiliates exclusive rights to its network programming is unlikely. Similarly, if satellite carriers may secure a compulsory license to retransmit the signals of network affiliates *only* in their home markets, then such rules would be unnecessary with respect to networks which satisfy the network definition in Section 119. With the emergence and development of Fox, UPN, WB, and, now, Pax Net, more stations ultimately may fall under the definition of network affiliate for purposes of the satellite compulsory license. In the meantime, however, even affiliates of networks which fail to qualify as networks under Section 119 (*e.g.*, new networks, regional sports networks, etc.) should be able to protect the exclusivity of their network programming.

C. The Commission Should Be Circumspect in Its Goals in Making Any Recommendation Concerning the "Unserved Household" Issue.

The Commission appears anything but reticent to tackle the "unserved household" issue. For a number of reasons, however, ALTV urges a more temperate approach rather than the current rush to fix what "ain't broke." First, the true solution the problem no longer is a pipe dream. Satellite retransmission of the signals of local network affiliates within their home markets is likely to be a reality sooner rather than later. EchoStar expects to gain access to additional capacity via its acquisition of News Corp/MCI's DBS capability. Capital Broadcasting persists in its plans to provide local-into-local service in every market. Therefore, in a few short years, the "unserved household'' issue will be moot.[32]

Second, to the extent any areas remain unserved, the development of digital television will eliminate much, if not all of the uncertainty about whether a particular household is unserved by a particular network. The "cliff effect" in digital signal propagation will permit a "picture" or "no picture" determination, thereby avoiding any subjective determination of signal strength or picture quality.

Third, Congress wisely elected to use an objective test based on signal intensity measured with a uniform and proven methodology. A signal of Grade B intensity is available at a household or it is not. The picture quality that signal produces, however, often is the product of the particularities of a *consumer's* decisions regarding antennas, receivers, etc.[33] Despite what satellite carriers may wish the Commission to believe, the unserved household provision was not intended to provide an alternative or substitute mechanism for consumers who with proper equipment could

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[32]ALTV also notes that cable systems are required to provide a basic tier of service offering, *inter alia*, the signals of local television stations. Many satellite subscribers may gain access to local signals in this manner.

[33]*See Notice* at ¶10 ("Consequently, a satellite company may not deliver network signals to a viewer simply because the viewer is subjectively unhappy with his or her television picture.").

produce a viewable (even if not perfect) picture. A consumer residing 50 miles from a station's transmitter with a pair of rabbit ears on a 15 year old set has little cause to complain about a lousy picture.[34] Furthermore, the legislative history only reconfirms the meaning and purpose of the definition of "unserved household."[35] The House Report states, for example, that "[i]n essence, the statutory license for network signals applies in areas where the signal cannot be received via rooftop antennas or cable."[36] It further states the network signals were included under the compulsory license "in recognition of the fact that a small percentage of television households cannot now receive clear signals embodying the programming of the three national television networks." Thus, the report explains, the bill confines the license to the so-called "white areas," that is, households not capable of receiving a particular network by conventional rooftop antennas...."[37] The "unserved household" provision, thus, was not intended to make-up for the shortcomings of consumers' aging sets or inadequate antennas. If anything, the Commission should be encouraging consumers to maintain adequate off-air reception capability. The Commission already has witnessed the demise of off-air reception capability with the growth of cable television. It should take no further action to promote the dismantling of off-air reception capability by satellite subscribers.

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[34]Indeed, the improved sensitivity of television receivers suggests that a Grade B signal is more likely than ever to produce a good picture on a viewer's set.

[35]The genesis of the definition of "unserved household" is the Satellite Home Viewer Act of 1988, P.L. No. 100-667, 102 Stat. 3949, 3957 (1988), 17 U.S.C. §119(d)(10) [hereinafter cited as the "1988 Act"]. That definition was maintained without amendment in the Satellite Home Viewer Act of 1994, P.L. No. 103-369, 103 Stat. 3477 (1994), 17 U.S.C. §119(d)(10) [hereinafter cited as the "1994 Act"].

[36]H.R. Rep. No. 100-887, Part I, 100th Cong., 2d Sess. (1988) 15 [hereinafter cited as "1988 H.R."].

[37]*Id.* at 18.

Fourth, as the emerging networks develop, the importance of preserving local network affiliates' access to their audiences will grow likewise.

Therefore, the Commission should hesitate to make any recommendation to alter the current unserved household provision in any material way.

IV. CONCLUSION

The Commission is poised to act precipitously in the apparent belief that even demonstrably arbitrary actions can be justified simply by a desire to promote competition to cable television. Such well-motivated, but ill-conceived actions as those proposed herein invite unintended consequences and judicial rebuke. In this case, in particular, they also would trample on the prerogatives of Congress and the courts, both of which are actively involved in sorting out the dispute and resolving the controversy. They also would do damage to the system of local television broadcasting it has nurtured and promoted for many decades.

ALTV, therefore, urges the Commission to do nothing more in this proceeding than make sound recommendations to Congress after a searching and thoughtful review of the issues.

Respectfully submitted,

James J. Popham
Vice-President, General Counsel
Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

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